

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT PORTER, )  
 ) Civil Action No. 04 - 1228  
 )  
Plaintiff, ) District Judge Nora Barry  
 ) Fischer/  
v. ) Magistrate Judge Lisa Pupo  
 ) Lenihan  
A. KING, Correction )  
Officer; ORENBAUN, )  
Correction Officer; CONNOR, )  
Correction Officer; MARK )  
CAPOZZA, Unit Manager; )  
DURCO, (Sergeant); THE )  
LIEUTENANT; and THE  
SERGEANT,  
  
Defendants.

**MEMORANDUM ORDER**

The above-captioned prisoner civil rights action was received by the Clerk of Court on August 17, 2004, and was referred to United States Magistrate Judge Lisa Pupo Lenihan for pretrial proceedings in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrate Judges.

The Magistrate Judge's Report and Recommendation (doc. no. 78), filed on October 30, 2007, recommended that the Defendants' Motion for Summary Judgment (doc. no. 70) be granted. On November 13, 2007, Plaintiff filed Objections (doc. no. 79) wherein he advised the Court that prisoner David Serrano observed defendants King and Orenbaun assault Plaintiff at and near his cell

in the Special Management Unit (SMU) at SCI-Greene on September 16, 2002. On November 19, 2007, Plaintiff filed an affidavit by David Serrano (doc. no. 81) averring that he observed defendants King and Orenbaun assault Plaintiff on September 16, 2002 and that defendant King raised his hand to a guard in the bubble telling him to open cell number 10. Because Plaintiff failed to present this evidence in his Opposition to Defendants' Motion, the Court is not required to take it into consideration at this time. Notwithstanding, because Plaintiff is appearing *pro se*, the Court will accept this evidence as part of the record in ruling on Defendants' Motion for Summary Judgment.

In the Report and Recommendation, the Magistrate Judge found that Plaintiff could not make out an Eighth Amendment claim of excessive force because he did not have any observable injuries and he had not submitted any evidence in support of his allegations. As he now has submitted an affidavit by an alleged eyewitness, Plaintiff has submitted sufficient evidence for the Court to find that there is a disputed issue of fact as to whether Defendants King and Orenbaun used excessive force on September 16, 2002 and whether Defendant Connor knowingly aided this attack by opening the door of Plaintiff's cell. See Smith v. Mensinger, 293 F.3d 641 (3d Cir. 2002).

After review of the pleadings and documents in the case, together with the Report and Recommendation, and the Objections thereto, the following order is entered:

**AND NOW**, this 17th day of December, 2007;

**IT IS HEREBY ORDERED** that Defendants' Motion for Summary Judgment (doc. no. 70) is **GRANTED EXCEPT** as to Plaintiff's excessive force claims against Defendants King, Orenbaun and Connor.

**IT IS FURTHER ORDERED** that the Report and Recommendation (doc. no. 78), filed on October 30, 2007, by Magistrate Judge Lenihan, is adopted as the opinion of the court.

s/Nora Barry Fischer  
Nora Barry Fischer  
United States District Judge

cc: Lisa Pupo Lenihan  
United States Magistrate Judge

Robert R. Porter  
DU-6434  
SCI Camp Hill  
P.O. Box 200  
Camp Hill, PA 17001

counsel of record